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No. 80-1766

In The

Supreme Court of the United States

October Term, 1980

COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY,

Appellant,

v.

PUBLIC UTILITIES COMMISSION OF OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

May a state deny compensation to a utility that furnishes service in an energy emergency, as required by state law?

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PARTIES BELOW

Columbus and Southern Ohio Electric Company ("Columbus and Southern") and the Public Utilities Commission of Ohio ("the Ohio Commission" or "the Commission") were the only parties in the Supreme Court of Ohio. The other parties participating in the proceedings before the Commission are listed on page A11 of the Jurisdictional Statement.

OPINIONS BELOW

The *per curiam* decision of the Supreme Court of Ohio is reported at 64 Ohio St. 2d 175, 18 Ohio Ops. 3d 389, 413 N.E.2d 1208 (1980). The decision of the Ohio Commission is unreported, but is reproduced in full in the Jurisdictional Statement.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1257(2) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are reproduced in the Jurisdictional Statement.

INTEREST OF EDISON ELECTRIC INSTITUTE

Edison Electric Institute ("EEI") is the national association of investor-owned electric utility companies. Its members serve 99.1 percent of all customers of the investor-owned utility industry and supply 77.1 percent of the nation's electricity. EEI's member companies are regulated by various state public utility commissions and hold franchises requiring them to furnish electric service to customers at approved rates. The state laws governing the provision of electric service and payment therefor are in important respects similar to the law of Ohio here in issue. Most states have energy emergency laws.[1] Others may have similar powers under general disaster legislation.[2] Under Ohio law as announced in this case, electrical utilities are expected to furnish uninterrupted service even in a declared energy emergency.

This case arose as a result of events occurring during the 1977-78 coal strike, which was the most protracted strike in the coal industry's long and troubled history. It was not, however, the last such strike; a similar one is in progress as this Brief is written.

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[1] *See* 1 Energy Mgt. (CCH) ¶9451, at 9198 (1977). *See also* Emergency Energy Conservation Act of 1979, §212, 42 U.S.C. §8512 (Supp. III 1979); Public Utility Regulatory Policies Act of 1978, §206(a), 16 U.S.C. §824a(g) (Supp. III 1979).

[2] Comptroller General of the United States, Improved Energy Contingency Planning is Needed to Manage Future Energy Shortages More Effectively 18 (Oct. 10, 1978) (EMD-78-106).

Coal strikes such as that which gave rise to this case affect many of EEI's members, which rely on coal as the principal fuel source for steam electric generation. In 1980, over 41 percent of the nation's electric generating capacity was coal-fired, producing over half the electricity used in this country. The continued availability of that capacity depends upon secure coal supplies, and access to reliable supplies of coal is dependent upon labor peace in the coal fields. While a growing number of EEI members own coal mines in whole or in part,[3] these companies have essentially no control over whether such peace will exist. The duration of labor unrest such as the 1977-78 coal strike is not predictable,[4] and cannot be taken into account in the development of utility rates.

Utility companies are exposed to extreme uncertainties in other respects as well. Two noted by the Department of Energy's "winter energy emergency plan" are a new oil embargo and severely cold temperatures.[5] Much of the fuel oil used for electric generation is imported. The last several years demonstrate all too clearly the extent to which domestic interests are at the mercy of unpredictable foreign events. Oil supplies may well be threatened as a result of the conduct of this nation's foreign policy or for reasons that bear no relation to American actions or policies.

Severe inclement weather, even in areas known for hard winters, may also give rise to extraordinary utility expenditures in the interest of maintaining or restoring service to customers.

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[3] Comptroller General of the United States, Low Productivity in American Coal Mining: Causes and Cures 93 (Mar. 3, 1981) (EMD-81-17).

[4] The 1977-78 strike occurred upon expiration of the United Mine Workers of America contract. Although the risk of a strike of some sort was known, its duration was literally unprecedented. Moreover, utilities' efforts to stockpile coal in anticipation of the strike were hampered by a proliferation of wildcat strikes. "Over 98 percent of all strikes between 1969 and 1976 have been wildcat strikes". *Id.* at 20.

[5] 1 Energy Mgt. (CCH) ¶9451, at 9195 (1977). It has also been suggested that sabotage, terrorism or enemy attack could lead to energy emergencies. Comptroller General of the United States, Federal Electrical Emergency Preparedness is Inadequate (May 12, 1981) (EMD-81-50).

See, e.g., Narragansett Elec. Co. v. Burke, 415 A.2d 177, 37 P.U.R. 4th 519 (R.I. 1980). Obviously, such events—like coal strikes or foreign political upheavals—are not controlled by a utility. More significantly, they cannot be calculated into the utility's usual rates or fully covered by fuel adjustment clauses. Such clauses typically make no provision for the recovery of non-fuel charges associated with the purchase of power from another supplier. These sums, representing demand charges and the non-fuel portion of the energy component of the power thus purchased, are at stake in this case.

If, as held below, a utility can be denied compensation for the extraordinary expenses it incurs to mitigate a severe disruption of its fuel supplies—or for other emergency reasons—in order to serve its customers, and if neither the ratemaking process nor fuel adjustment clauses allow for the recovery of such extraordinary expenses, the utility will have been made an uncompensated guarantor for matters wholly beyond its control.[6] The issue, therefore, potentially affects virtually every electric utility in the country. A matter of such gravity should be resolved on a firmer basis than the two page *per curiam* decision here on review.

STATEMENT OF THE CASE

The 1977-78 coal strike had adverse effects on many utilities in addition to Columbus and Southern. Thus, according to testimony presented before a committee of the House of Representatives as the strike was in progress, the strike affected at least 28 utilities in Pennsylvania, Maryland, West Virginia, Ohio, Indiana, Kentucky, Michigan, Illinois, Tennessee, Alabama and Mississippi.[7] Emergencies were declared in Ohio

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[6] *Cf. Otter Tail Power Co. v. United States,* 410 U.S. 366, 374 (1973)(noting Congressional determination not to impose common carrier obligations on electric utilities); *Richmond Power & Light v. Federal Energy Regulatory Comm'n,* 574 F.2d 610, 623 & n.59 (D.C. Cir. 1978).

[7] *Energy Impacts of the Coal Strike: Hearing before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce,* 95th Cong., 2d Sess., ser. 95-132, at 5 (1978) (testimony of John F. O'Leary, Dep. Sec'y of Energy).

and elsewhere by state officials.[8] On February 11, 1978, in response to a petition by the Governor of Ohio, President Carter declared an energy emergency under section 110(f) of the Clean Air Act.[9] Similar determinations were issued regarding Indiana, Kentucky, Pennsylvania, Maryland and Alabama.[10] Ohio chose to require each utility to file its own separate plan for dealing with the emergency, while Indiana, West Virginia, Virginia and Kentucky adopted statewide plans. The Tennessee Valley Authority had its own plan. Nat'l Elec. Reliability Council, The Coal Strike of 1977-78: Its Impact on the Electric Bulk Power Supply in North America 4 (May 30, 1978). Like Columbus and Southern and the other Ohio utilities, utilities in other states incurred extraordinary purchased power expenses. Unlike Columbus and Southern, however, at least some utilities in other jurisdictions were allowed to recover all of those expenses. *See City of Pittsburgh v. Pennsylvania Public Utility Comm'n,* 42 Pa. Commw. Ct. 242, 400 A.2d 672, 674 (1979); *In re Potomac Edison Co.,* No. 9208 (W.Va. Pub. Serv. Comm'n Dec. 28, 1978).

The provision of utility service during times of scarcity advances a public policy of the highest order. In the 1977-78 coal strike, the strong public interest in avoiding blackouts, voltage reductions and other measures that impinge directly on users of electricity—both commercial and residential—was vindicated to a remarkable extent, thanks in large part to utility advance planning, customer cooperation, and the existence of interconnections which facilitate the wheeling of power from areas of plenty to areas of scarcity.

This happy result had the side effect of increasing costs. "The power purchases and exchanges generally insured the reliability of the electrical system, but did work to increase the cost of electricity generated and exchanged during the emergency".[11] That such increases in the cost of service would occur

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[8] *Id. See generally* GAO Report, *supra* note 2, at 26-29.

[9] *House Hearing, supra* note 7, at 30; 43 Fed. Reg. 12273, 12283 (Mar. 24, 1978).

[10] 43 Fed. Reg. 12275-89, 13365 (1978).

[11] GAO Report, *supra* note 2, at 30.

was clearly known to the Ohio Commission. In the course of the strike, the Commission entered the following findings, among others:

> (3) In order to preserve remaining coal stock piles the utilities have purchased power in excess of normal requirements and have dispatched power among their own facilities in deviation from economic dispatch.
>
> (4) These actions result in increased costs of power supply.
>
> (5) The customers of each utility should be advised of those increased costs and receive an indication of the effect of such increases to [sic] their bills for electric consumption.[12]

The clear implication of this action was that consumer bills would reflect the costs of the power purchased by the utilities in meeting the declared emergency conditions. Neither the Commission's decision in this case nor the Ohio Court's *per curiam* here on review makes any reference to these findings. For reasons that are not apparent, once the strike was over and the danger averted, the Commission chose to disregard the view it had previously expressed concerning who was to pay for the benefit of uninterrupted service.

In the aftermath of the 1977-78 coal strike, the Department of Energy issued regulations implementing the standby Federal energy conservation plan provisions of the Emergency Energy Conservation Act of 1979.[13] The preamble to those regulations recognizes that wheeling "and modified system dispatch may result in higher electricity costs for utilities and customers," and goes on to observe that "power-wheeling may result in increased (and possibly non-recoverable) costs to

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[12] *In re Emergency of the Electrical Energy Supply within the State of Ohio*, No. 78-106-EL-UNC (Ohio Pub. Utils. Comm'n Mar. 7, 1978).

[13] 42 U.S.C. §8513(b) (Supp. III 1979); 45 Fed. Reg. 8462 (Feb. 7, 1980).

importing utilities and may require a temporary adjustment in rate structures to make it feasible."[14] "Without the strong support of State regulatory officials, utility managers may be reluctant to institute these measures and to incur the higher than normal operating costs associated with them".[15]

EEI certainly agrees that energy emergency management requires strong support from state regulatory officials for utility actions that mitigate otherwise critical conditions, but the matter is not merely one of administrative preference. As indicated in the Jurisdictional Statement and in the succeeding portion of this Brief, if a state requires that continued service be furnished in an emergency, the regulatory agency must in some manner make provision for the recognition of emergency-related non-fuel costs of purchased power. Otherwise, confiscation has occurred.

Here, Columbus and Southern exhausted every route conceivably available to it to recover expenses the Ohio Commission recognized would be inevitable and properly chargeable to customers. Far from questioning the prudence of these expenses, the Ohio Court has held, as a matter of state law, that the utility was only doing what it was required to do to meet the emergency. To deny it recovery in these circumstances violates the constitutional prohibition against confiscation.

THE QUESTION PRESENTED IS SUBSTANTIAL

OHIO'S ACTION UNCONSTITUTIONALLY DEPRIVES THE UTILITY OF JUST COMPENSATION FOR COSTS OF SERVICE FURNISHED IN AN EMERGENCY, FOR WHICH NO OTHER RECOVERY IS AVAILABLE.

This case presents a question of constitutional dimension with unusual clarity: may a state deny compensation to a utility that furnishes electric service in an energy emergency, as required by state law? Ohio required Columbus and Southern to purchase more costly power as an emergency measure for the

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[14] 45 Fed. Reg. at 8489; 5 Energy Mgt. (CCH) §32,501, at 32,699.

[15] *Id.*; 5 Energy Mgt. (CCH) ¶32,501, at 32,700.

purpose of conserving coal supplies, and thereafter denied recovery from the customers of that portion of the resulting extra expense not recovered through operation of a fuel adjustment clause.[16]

Several critical facts govern this case: (1) an energy emergency existed, (2) the utility was held to have an obligation to furnish service, (3) the utility was not itself to blame for the emergency, (4) the duration of the strike could not reasonably have been predicted or taken into account in the development of rates, (5) the utility furnished service without interruption during the emergency, and in the process (6) incurred extraordinary but proper expenses of more than $6,000,000 which (7) it has been barred from recovering from the customers who received that service. The result is a clear taking without just compensation in violation of the Constitution.

Decisions of this Court establish that a public utility is entitled to be compensated for the costs incurred in providing service to its customers. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). "The compensation which the Constitution guarantees an opportunity to earn is the reasonable cost of conducting the business. Cost includes not only operating expenses, but also capital charges". *Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276, 291 (1923) (Brandeis, J., concurring); *Hope Natural Gas, supra*, at 603. This Court has repeatedly held that a public utility is entitled to recover all reasonable costs of providing service to its

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[16] This case does not present the question whether every unpredictable utility cost must be reimbursed in full. Rather, the narrow issue is whether, in an unquestionable emergency, the costs of furnishing the uninterrupted service here found to be required by state law must be borne by those who receive it. Resolution of this issue is proper on the facts of this case, since there is no doubt that an emergency existed as a result of the 1977-78 coal strike. Federal and state declarations to that effect make it unnecessary for the Court to fashion a test for determining whether a particular situation constitutes an emergency.

customers.[17] In short, it is an "obvious basic premise" that "[a] rate order which does not provide for proper allowable expenses, taxes, depreciation and return, is unfair, unreasonable and confiscatory." *Mississippi River Fuel Corp. v. FPC,* 163 F.2d 433, 451 (D.C. Cir. 1947). "If properly incurred, [expenses] must be allowed as part of the composition of the rates. Otherwise, the so-called allowance of a return upon the investment, being an amount over and above expenses, would be a farce". *Id.* at 437.

The decision below directly contravenes these teachings in a divided *per curiam* opinion that is as ill-conceived and devoid of authority as it is brief. None of the majority's four reasons for rejecting Columbus and Southern's request has the slightest merit.

1. First, the majority observed that the Ohio Commission "has consistently disallowed utility companies, including appellant, from recovering the non-fuel costs associated with the emergency period" of the 1977-78 strike. The only authority cited for this proposition was a pair of unreported Commission decisions dealing with the same coal strike and dating from November 1978. Neither was the subject of judicial review, and neither is entitled to deference as binding constitutional precedent from the standpoint of source or age. All they show is that the Ohio Commission made the same error in other recent cases. Whatever the case might be if the doctrine relied on were longstanding and widespread, *Payton v. New York,* 445 U.S. 573, 600 (1980), or "fortified by acquiescence continued through the years," *Life & Casualty Ins. Co. of Tennessee v. McCray,* 291 U.S. 566, 572 (1934)(citations omitted), none of these considerations lend any support to the result below.

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[17] *Driscoll v. Edison Light & Power Co.,* 307 U.S. 104, 121 (1939); *West Ohio Gas Co. v. Pub. Utils. Comm'n of Ohio (No. 1),* 294 U.S. 63, 68 (1935); *West Ohio Gas Co. v. Pub. Utils. Comm'n of Ohio (No. 2),* 294 U.S. 79 (1935); *Ohio Utils. Co. v. Pub. Utils. Comm'n of Ohio,* 267 U.S. 359, 363 (1925); *Georgia Ry. & Power Co. v. Railroad Comm'n,* 262 U.S. 625, 633 (1923); *Galveston Elec. Co. v. City of Galveston,* 258 U.S. 388, 399 (1922). *See generally* 1 A. Priest, *Principles of Public Utility Regulation* 49-51 (1969). Given the Commission's directives during the crisis, *see* Jurisdictional Statement at A92, there is no question as to the reasonableness of the purchases.

2. Second, the majority suggested that no taking occurred because the Commission "simply ordered appellant to do only that which appellant had a statutory obligation to provide for the public." This argument, for which no case authority was cited, is irrelevant. Regardless of when and from where the obligation arose,[18] with the obligation came a constitutional right to be justly compensated for costs that could not be brought within the ratemaking process.

3. The majority's third claim was that the Ohio Commission's response to the coal strike conferred an "unquantified benefit" on Columbus and Southern "by assuring that no other utility's failure to provide energy would adversely reflect upon the appellant's ability to provide future services."[19] This "benefit" is a transparent *post hoc* rationalization which, as this Court has held, "must be viewed critically." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410 (1971). A moment's reflection shows it to be "convenient, but false." *Craig v. Boren,* 429 U.S. 190, 199 n.7 (1976).

The effect on Columbus and Southern was neither beneficial nor unquantified. What was conferred was a loss of more than $6,000,000 spent as the non-fuel costs of providing

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[18] The Ohio Court took the position that Columbus and Southern's duty to furnish uninterrupted emergency service arose from §4905.22 of the Ohio Code—a general service provision—rather than §4909.16, which is specifically addressed to energy emergencies, and which was relied on by the Ohio Commission in its February 14, 1978 order. Jurisdictional Statement at A92. While it is immaterial which statute is relied on for constitutional purposes, the notion that the utility's duties were the same regardless of the energy emergency legislation and Commission action thereunder does seem improbable in the extreme, since it requires one to assume that the Ohio Legislature acted unnecessarily in passing the emergency measure. *E.g., Jackson v. Kelly,* 557 F.2d 735, 740 (10th Cir. 1977); *Uptagrafft v. United States,* 315 F.2d 200, 204 (4th Cir.) (per curiam), *cert. denied,* 375 U.S. 818 (1963); *cf. United States v. Menasche,* 348 U.S. 528, 538-39 (1955).

[19] The notion that Columbus and Southern benefited from the Commission's action in dealing with the emergency appears nowhere in the Commission's decision. Rather, the point emerged, without any basis in the record, in the main brief filed by the appellee in the Supreme Court of Ohio. *Cf. West Ohio Gas Co. v. Pub. Utils. Comm'n of Ohio (No. 2), supra* note 17, at 82-83 (*semble*).

purchased power to the customers. The only "benefit" was that conferred upon Columbus and Southern's customers, who received service without paying for it. To describe this as a "benefit" to Columbus and Southern is Kafkaesque.

The Ohio Court's characterization of this topsy-turvy "benefit" shows it to be a figment. The ability or inability of Utility A to provide energy could never "adversely reflect upon" Utility B's "ability to provide future services." Though interconnected, utilities are distinct and it demeans the intelligence of the public to assume that it treats them all as a single entity to which some form of collective responsibility applies. If the Ohio Commission and Court, on the other hand, were assuming they were doing Columbus and Southern a favor by protecting it from harm to its reputation for reliability, one would think that this is a matter classically left to business management, not forced on unwilling shareholders as a lame excuse for disallowing a valid claim for unquestionably proper costs of service. "Benefits" as illusory as these can be foregone.

Alternatively, if the Ohio Court was intimating that the utility here had received the "benefit" of being able to continue its operations (and therefore continue its cash flow from the sale of energy, albeit without full recovery) as a consequence of the purchases, the point still would have no merit. This Court in an opinion by Justice Cardozo unanimously rejected a similar argument by the same Commission nearly 50 years ago in *West Ohio Gas Co. v. Pub. Utils. Comm'n of Ohio (No. 2), supra* note 17, at 82-83. To adopt such an argument is to approve a "free ride" on the theory that the company had to operate its plants anyway. Electric customers, however, are no more entitled to a "free ride" as far as the extra cost of purchased power is concerned, than were the industrial gas customers in *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 615 (1945) (Jackson, J., concurring). As Justice Jackson pointed out, the notion of a "free ride" is not acceptable "as a principle of public regulation." To accept it in this case is to tolerate confiscation.

4. Finally, the Ohio majority argued, on the basis of this Court's decision in *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n of West Virginia*, 262 U.S. 679 (1923), that

"a public utility has no constitutional right to recover past and unrecovered costs through present and future rates." This application of *Bluefield* is made possible only by a partial quotation which stands that case on its head.

In *Bluefield,* this Court held that a public utility was being deprived of just compensation because it was compelled to serve the public at confiscatory rates. *Id.* at 695. In reaching this conclusion, this Court stated:

> The fact that the company may not insist as a matter of constitutional right that past losses be made up by rates to be applied in the present and future tends to weaken credit, *and the fact that the utility is protected against being compelled to serve for confiscatory rates* tends to support it. *Id.* at 694 (emphasis added).

Thus, *Bluefield* teaches that a utility cannot be forced to serve the public at a loss. Only by ignoring the second half of the sentence quoted can *Bluefield* be said to support the proposition that the Ohio Commission may deny just compensation for a legitimate cost of providing service.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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